

Supreme Court, U.S.
FILED

MAY 29 1979

CHARLES E. RODIK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. . . .

78-1777

BREWERY DRIVERS AND HELPERS LOCAL NO. 133,
AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,

v.

GREY EAGLE DISTRIBUTORS, INC., et. al.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Eighth Circuit

DUFF, GILMORE AND HECKEL
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OPINIONS BELOW

The opinion of the Court of Appeals is reported as 593 F.2d 288 (1979) and in BNA, 100 LRRM 2692. It is attached hereto as Appendix A, pp A1 to A-10.

The opinion of the U.S. District Court for the Eastern Division of the Eastern District of Missouri (Hon. Kenneth H. Wangelin) is not reported.

JURISDICTION

The final Order of the U.S. Court of Appeals for the Eighth Circuit, denying petitioner a rehearing, was entered on February 28, 1979. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Can a Local Union exercise its economic strength to further resolution of disputes provoked by the Employers unilateral, unlawful termination of negotiations and the labor agreement and also, coincidentally, seek to compel the Union's contractual right to arbitrate the grievances framed by the disputed, unilateral, unlawful termination of negotiations and the labor agreement?

STATEMENT OF THE CASE

The petitioning Union and the respondent employers (six separate beer distributor companies operating in the Greater St. Louis, Missouri area) were parties to a collective bargaining agreement from 1973 until February 29, 1976. Negotiations for a replacement agreement had been underway from January, 1976 through Thursday, April 8, 1976. The parties had been extending the labor agreement on a day-to-day basis through March and early April, 1976 while negotiations continued. On Thursday, April 8, 1976 the employers notified the Union that they were terminating further negotiations and also terminating the labor agreement.¹ The Union protested these terminations to the employers and filed an unfair labor practice charge the same day at the N.L.R.B. The Union also advised the employers that the employees would continue to report for work. On Friday, April 9, 1976 the employers notified their employees and the Union that on Monday, April 12, 1976 all beer delivery trucks would be loaded with 250 cases of beer per truck, per day, per man instead of the extended 1973-1976 labor agreement "load limit" of only 210 cases of beer per truck, per day, per man. The Union then notified its members to refuse to deliver

the "overloads" and if the overload orders of the employers were not rescinded on Monday, April 12, 1976 they should leave the employers premises instead of taking the overloaded trucks out for deliveries that day. The overload orders were not rescinded, the employees left their work areas and began to picket each employer on Monday morning, April 12. The refusal to work and picketing continued for eleven weeks, until a new labor agreement was finally negotiated and ratified.

During the eleven week period neither the Union nor the employers sought to arbitrate the termination or the overload disputes.

On November 24, 1976 the NLRB settled the unfair labor practice charge filed by the Union against the employers via a "settlement agreement" which provided, among other things, that the employers would not "unilaterally implement(ing) changes in the delivery load limits . . . without bargaining collectively with the Union . . . to an impasse about such changes." The settlement agreement between the NLRB and the employers also contained a non-admission clause whereby the employers did not admit to an unfair labor practice.²

On July 30, 1976 the Union commenced this litigation in the U.S. District Court, essentially seeking damages from the employers for the members' loss of approximately One Million Dollars in wages during the eleven week period of refusal to work and picketing. The Union's damage action was predicated upon the Union's contentions that the employers had breached the 1973-1976 labor agreement by unlawfully terminating the negotiations, the labor agreement itself and then unilaterally ordering the contractual load-limit of 210 cases of beer per truck, per day, per man increased to 250 cases.

¹ The labor agreement articles providing for these terminations are set out in the Court of Appeals opinion, Appendix A hereto. The other relevant labor agreement articles are also in the Court of appeals opinion.

² The relevant portions of the NLRB settlement documents are set out in the Court of Appeals decision (Appendix "A").

The District Court granted the employers' motion to dismiss the Union's complaint. A timely appeal was filed. The Eighth Circuit Court of Appeals affirmed the dismissal of the complaint for failure "to state a cause of action" for a reason which was different from and "more important" than those stated by the District Court.

The Union pleaded, among other forms of relief sought in both the District Court and the Court of Appeals, for Orders to compel arbitration of the Union's claims, including, if necessary, the preliminary issue of the arbitrability of the disputes, as an alternative to its claims for court adjudicated damages.

The Court of Appeals refused to grant the Union's timely petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit's Decision Is In Conflict With Applicable Decisions Of This Court And The Third Circuit Court Of Appeals.

In this case the Eighth Circuit finds that a Union cannot ". . . ignore arbitration . . . strike in order to secure a new contract . . . and then recover lost wages for its striking members". (pg. A-10). This finding clearly ignores the pleaded fact that the trigger for the Union's refusal to work and picketing was the Union's claim that the employers breached the then extant labor agreement by 1) refusing to negotiate further, 2) unilaterally terminating the labor agreement, and, 3) ordering the delivery trucks to be loaded in excess of the contractually agreed "load-limit". This Court ruled in *Nolde Brothers, Inc., v. Local No. 358 Bakery Workers, etc.*, 430 U.S. 243, 97 S.Ct. 1067 (1977):

"While the termination of the collective bargaining agreement works an obvious change in the relationship between the employer and union, it would have little impact on many of the considerations behind their decision to resolve their contractual differences through arbitration. The contracting parties' confidence in the arbitration process and an arbitrator's presumed special competence in matters concerning bargaining agreements does not terminate with the contract." (at 1073 of 97 S.Ct.).

In *Nolde* (supra) this Court specifically found that the grievance/arbitration duty extends beyond termination of the labor agreement so long as the contractual arbitration clause does not, of itself, expressly exclude arbitration of disputes after termination of the labor agreement. Obviously, disputes regarding the conduct of an employer in terminating negotiations and the labor agreement in violation of contractual provisions governing negotiations and termination requirements could not be expressly excluded from post-termination arbitration.

This Union-petitioner has pleaded, to no avail thusfar, that it did *not* undertake an economic strike on Monday, April 12, 1976. The Eighth Circuit chose to characterize the Union's conduct as a "strike". The Union instructed its members to refuse to work on the deliberately overloaded trucks. An evidentiary hearing of the Union's pleaded position, preferably in an arbitration arena, will allow the Union to properly develop and establish this subtle, but critically important, distinction. The question of whether the Union's activity on Monday, April 12, 1976 was a strike or some other form of economic pressure is probably mooted by the decision of the Third Circuit in the case of *United Steelworkers of America v. N.L.R.B.*, 530 F.2d 266 (3d Cir.) cert. denied, 429 U.S. 834 (1976). The Eighth Circuit devoted approximately three pages of the twelve pages in the slip opinion to the Third Circuit's *Steelworkers* (supra) decision. The Eighth Circuit then concluded its analysis of the applicability of *Steelworkers* (supra) to the instant case with the comment "We have no quarrel with the Third Circuit's (*Steelworkers*,supra) decision." The Union-petitioner respectfully disagrees. The Third Circuit's *Steelworkers* case is similar in many vital respects to this case. The Third Circuit urged that the Steelworkers Union be allowed to arbitrate its grievances against the involved employer, even though the Union had "struck prematurely."

The Eighth Circuit cited two other pre-*Steelworkers* (supra) Third Circuit cases in obvious support of its position in this case. The first of these two cases is *Controlled Sanitation Corp. v. District 128, etc.*, 524 F.2d 1324 (3d Cir. 1975) cert. denied, 424 U.S. 915 (1976). In fact, the Third Circuit specifically held in *Controlled Sanitation* (supra) "... we believe the (contract) repudiation question is also subject to arbitration.", 425 F2d at page 1326.

The second pre-*Steelworkers* (supra) Third Circuit case cited with obvious approval by the Eighth Circuit is *Childrens Rehab. Ctr. Inc., v. Service Emp., Local 227*, 503 F2d 1077, cert.

denied, 419 U.S. 1090. In the *Steelworkers* decision (at 280 of 530 F2d) the Third Circuit disavowed its earlier position in *Childrens Rehab. Ctr.* (supra) by finding that it was a "narrow holding" and then proceeded to "... agree with the views expressed by Chief Judge Seitz..." in his *dissenting* opinion in *Childrens Rehab. Ctr.* (supra).

The Union-Petitioner respectfully submits that the Eighth Circuit's decision is in conflict with this Court's decision in *Nolde Brothers, Inc.*, (supra) and with the Third Circuit's decision in *Steelworkers* (supra).

II. This Court Can Resolve The Arbitrability Issue Raised In This Petition By Its Summary Orders Mandating Arbitration In Accord With The National Labor Policy.

If the decision below is allowed to stand, a new and haunting specter has been injected into labor relations in the Eighth Circuit. An employer can now terminate negotiations with its Union, at will, terminate its contract, at will, then manipulate vital working conditions, at will, and leave the beknighted Union at the mercy of slow-motion arbitration and NLRB procedures while the employer inflicts its will onto the effectively shackled employees and their Union. The November, 1976 settlement which the NLRB finally accomplished with the employers evoked the hollow promise that the employers would not, again, refuse to bargain in good faith by unilaterally implementing changes in vital working conditions (the per truck, per day, per man load delivery limits). Unfortunately this settlement came about almost five months after the parties, themselves, had agreed to a new labor agreement by negotiating, literally, out in the street. Alternatively, to damn this Union for not demanding arbitration on Monday, April 12, 1976 from employers who had unilaterally terminated on-going negotiations, unilaterally terminated the labor agreement and unilaterally imposed gruesome working conditions onto their employees is tantamount to forcing it to negotiate and/or ar-

bitrate while the employers hold a loaded pistol to its head. The Union responded to the employers' grossly unlawful tactics with the only weapon available for its self-defense—a refusal to work! The emphasis of the Third Circuit's *Steelworkers* (supra) case of placing the burden onto the *employers* to demand arbitration under these circumstances is the only sensible and workable solution. The beer delivery employers failed to do so. The Union proceeded to settle its labor agreement, after eleven agonizing weeks, and, within the same month, July, 1976, sought to assert its claim for damages in the U.S. District Court either by arbitration or a court trial. Thusfar, it has been denied any relief.

This Court has the authority to summarily remand this case and direct the District Court to order the parties into arbitration. This Court apparently anticipated the need to consider this type of relief in its footnoted comment in *Nolde Bros. Inc. v. Local No. 358, etc.* (supra) when it stated that ". . .we need not speculate as to the arbitrability of post-termination contractual claims . . ." (footnote No. 8, page 1074 of 97 S.Ct.). This Union-petitioner clearly and readily agrees that the arbitrability and timeliness of its demand for arbitration can be included as issues remanded for an arbitrator to determine.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and, alternatively, this case should be summarily remanded with appropriate Orders for the parties to arbitrate their disputes.

Respectfully submitted,

DUFF, GILMORE AND HECKEL,

BY:

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Certificate of Service

I hereby certify that on this 25th day of May, 1979, three copies of the Petition for Writ of Certiorari were personally delivered to John P. Emde, Esq., 611 Olive Street, Suite 1950, St. Louis, Missouri 63101, Counsel for Respondent. I further certify that all parties required to be served have been served.

JEROME J. DUFF,
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St. Louis, Missouri 63101
Counsel for Petitioner

APPENDIX

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 78-1036

Brewery Drivers & Helpers Local
No. 133 of St. Louis, Missouri,
Affiliated with the International
Brotherhood of Teamsters,
Chauffeurs, Warehousemen &
Helpers of America,

Appellant,

v.

Grey Eagle Distributors, Inc.;
Lismark Distributing Co.; Lohr
Distributing Co., Inc.; B.A.M.,
Inc.; R.M.W., Inc.; St. Louis
Stag Sales, Inc.; St. Louis Beer
Wholesalers Assn. of St. Louis,
Missouri,

Appellees.

Submitted: September 12, 1978

Filed February 7, 1979

Before HEANEY and STEPHENSON, Circuit Judges, and
VAN SICKLE,* District Judge.

HEANEY, Circuit Judge.

* The Honorable BRUCE M. VAN SICKLE, United States District
Judge for the District of North Dakota, sitting by designation.

Appeal from the
United States
District Court for
the Eastern District
of Missouri.

The Brewery Drivers & Helpers Local No. 133 appeals from a judgment of the District Court for the Eastern District of Missouri dismissing its complaint. We affirm.

The Union signed a collective bargaining agreement with the individual appellees in 1973 which was to expire on February 29, 1976.¹ Negotiations on a new agreement began in January, 1976. During the bargaining, the employer sought to modify Article XIX and XX so as to permit drivers to haul more cases of beer in a single load. These articles provided in part:

ARTICLE XIX

Work Described

Section 1.—The work of truck drivers, chauffeurs, warehousemen and helpers shall consist of loading and unloading of all city delivery trucks and city delivery trailers (except as mutually agreed) and the delivery of beer and beverages to customer accounts in Greater St. Louis and Vicinity when such accounts are serviced directly by the Employers and not through beer wholesalers or distributors[.]***

Sec. 2.—Trucks and Trailers shall be loaded with all due regard for the safety of the operator and shall not carry more than 1,000 cases of beer to retail outlets (such to be classed as a "load limit").

Sec. 3.—A load, regardless of delivery, shall consist of, not to exceed 210 packages or its equivalent without a helper. Trucks may make more than one trip per day if time permits, provided that where an employee's deliveries exceed 210 packages he will be supplied a helper.

ARTICLE XX

Helpers

Section 1.—Drivers shall be furnished with helpers, where by mutual consent between the Union and the Employer it is deemed necessary. In cases of inability to agree either the Union or the individual Employer may, upon due notice, refer the matter to arbitration.

Sec. 4.—*** When there are in excess of five hundred (500) cases of beer on city trucks or trailers for city delivery, three men shall be required up to 1,000 cases. Further, where trucks and trailers in the city pick up empty cases in excess of 500, three men shall be required up to twelve hundred (1,200) cases.

On Thursday, April 8, 1976, each of the appellees notified the Union that "*** it is not probable that further negotiations will result in an agreement. We are therefore terminating further negotiations and declare that the terms and provisions of the Collective Bargaining Agreement which expired on February 29, 1976 shall no longer be continued in full force and effect subsequent to [April 12, 1976]." The termination notice was presumably intended to conform with Article XL of the Agreement which provided in part as follows:

1.—The Parties shall continue to bargain and negotiate in good faith in an effort to reach a complete Agreement and understanding covering the terms and provisions of a new contract to take the place of this one or a contract containing the desired modifications, and such negotiations shall continue until either a complete Agreement and understanding is reached or until either or both Parties conclude that it is not probable that further negotiations will result in an Agreement.

¹ We need not decide whether the St. Louis Beer Wholesalers Association is a proper party to this action.

2.—All of the terms and provisions of this contract shall be continued in full force and effect and extended from the termination date [sic] hereof to such time as the parties either enter into a new Agreement, or Agreement containing the desired modifications, or terminate further negotiations in the manner above mentioned.

On Friday, April 9, 1976, the Union acknowledged the notification and rejected the attempted termination. It stated in a letter to the defendants:

This Union is convinced that further bargaining and negotiating in good faith in an ongoing effort to reach a complete Agreement and understanding covering the terms and provisions of a new contract should continue. We are prepared to meet with you and your representatives for this purpose.

Our members employed by the various involved Companies have been instructed to report and to be available for work in a normal fashion. Their continuing employment must be under all of the terms and conditions of the 1973-76 labor agreement as it is now extended.

It also called for continuing negotiations in an effort to reach a new agreement.

Later the same day, the Union was told that each of the companies had ordered their employees to load each delivery truck with 250 cases of beer. The Union notified its members that they should refuse to "overload" the delivery trucks (250 cases) and should refuse to work and that if the "overload" orders were not rescinded, they should leave the employer's premises. The orders were not rescinded and the Union members began picketing the appellees on Monday morning, April 12.

The Union simultaneously filed unfair labor practice charges with the National Labor Relations Board. It charged that the Association had refused to bargain by sending copies of its final

proposal to individual employees in a form that was allegedly different from the final proposal presented to the Union negotiating committee.

The strike continued for approximately eleven weeks. A new contract was then agreed to and the drivers returned to work. Subsequent to their return, the Association signed a settlement agreement terminating the National Labor Relations Board proceedings. It provided in part as follows:

WE WILL NOT refuse to bargain collectively and in good faith with Brewery Drivers and Helpers Local Union No. 133, * * * the exclusive bargaining representative of our employees, by unilaterally implementing changes in the delivery load limits of our employees without bargaining collectively with [the] Union * * * to an impasse about such changes.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act.²

The Association also agreed to post appropriate notices. The settlement agreement contained a non-admission clause which read as follows:

By entering into this Settlement Agreement, the Charged Party does not admit that it has committed any unfair labor practices.

Sometime after the men returned to work, the Union commenced an action in the District Court for the Eastern District of Missouri. It alleged in its complaint that the appellees, by ordering employees to commence to load and deliver beer in ex-

² During its investigation, the Board apparently determined that the conduct described in the notice was the only conduct which arguably constituted an unfair labor practice.

cess of the daily limitations set forth in Article XIX and XX of the labor agreement between the parties, had breached the terms and conditions of the Agreement. It further alleged that the breach of the Agreement required the employees to terminate their work for the appellees, that they did not return to work for eleven weeks and that they lost a total of \$1,084,000 in wages during that period.

Subsequent to the filing of the complaint, the employers filed a motion to dismiss the complaint, and the Union filed a motion for summary judgment. The District Court granted the employer's motion to dismiss and denied the Union's motion for summary judgment. It held that the employers had not breached the contract and had properly terminated it. It further held that the Union had no right to reject the termination; and that when the strike began on April 12, 1976, no contract was in force. The court stated:

The facts demonstrate conclusively that no breach occurred before the termination. The action taken by defendants on Friday, April 9, 1976 in ordering two hundred fifty (250) cases placed on each truck did not conflict with the terms of the contract. It was not possible that the trucks would be used for delivery until Monday, April 12th. On that day, the contract was no longer in force. Thus, even had defendants ordered delivery (which did not occur because of the strike) there would have been no breach.

It is immaterial whether the Court characterizes these facts as adequate to grant summary judgment to defendants or as reason to dismiss for lack of jurisdiction. * * * Plaintiff may not prevail in this action and it will be dismissed. [Citation omitted.]

The Union appeals from the dismissal. It contends that it was improper because there were disputed issues of fact with respect to the question of whether a breach of the contract occurred before the termination. It is unnecessary for us to determine

whether the District Court erred in dismissing the complaint on the grounds that it did because, in our judgment, the complaint failed to state a cause of action for another and a more important reason. To put the matter simply, a Union cannot bring an action for wages lost by its members during a strike called by the Union to protest an alleged breach of a collective bargaining agreement containing an arbitration clause similar to the one in the agreement between these parties³ unless the Union has first

³ Article XV, pertaining to grievance and arbitration, of the collective bargaining agreement provided in part:

Section 1.—In the event of a dispute, difference or disagreement between the Employer and the Union concerning the interpretation or application of the terms of this Agreement, representatives of the Employer and the Union shall make an honest and sincere effort to adjust the same in an amicable manner. In the event, however, of the inability of the Company and the Union to reach an agreement on the issue or issues in dispute, the question may, at the option of either party, be submitted for arbitration in the following manne :

Sec. 2.—Either party may demand arbitration and shall give (5) days advance notice, in writing, to the other Party of its desire to arbitrate. The dispute shall be submitted to the Board of Arbitration of three (3) persons. One person shall be selected by the Union, one by the Employer, and the third by the first two. Designations of the persons selected by the Union and by the Employer must be made within ten (10) days after the demand for arbitration is made, and the two designees must select the third arbitrator within ten (10) days thereafter; provided, however, that in the event that the first two arbitrators cannot agree upon the selection of the third, then the third shall be appointed, upon request by either party, by the then Presiding Judge of the St. Louis Court of Appeals.

Sec. 3.—After the matter has been referred to arbitration, and while it is pending arbitration, there shall be neither strike nor lock-out; provided, however, that if neither party demands arbitration, or if, after arbitration is demanded, the other party fails or refuses to cooperate in prompt selection of, and submis-

agreed to submit the dispute to arbitration pursuant to the arbitration provisions of the collective bargaining agreement and the employer has rejected that offer.

When the employers notified the Union that they were terminating the collective bargaining agreement and were instructing their employees to load trucks with 250 cases of beer rather than 210, the Union could have demanded that the validity of the termination notice and the validity of the order to "overload" the trucks be submitted to arbitration. *See Drake Bakeries v. Local 50*, 370 U.S. 254 (1962); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Controlled Sanitation Corp. v. Dist. 128*, 524 F.2d 1324 (3d Cir. 1975), cert. denied, 424 U.S. 915 (1976). It did not do so, choosing instead to use its economic strength. It was free to make the choice as the agreement specifically provides that it could use economic power in support of its demands and such action was not a violation of the contract, notwithstanding any other provision of the contract when the employer had previously selected that method of resolving the dispute. *See Rae v. United Parcel Service of Pa.*, 356 F.Supp. 465 (E.D. Pa. 1973).

The Union argues strenuously that its position that it can recover damages for the employers' "breach," notwithstanding its decision to strike, is supported by *United Steelworkers of Am., AFL-CIO-CLC v. N.L.R.B.*, 530 F.2d 266 (3d Cir.), cert. denied, 429 U.S. 834 (1976). In that case, the employer had unilaterally implemented a shift change. The union, without exhausting the grievance and arbitration procedures, instituted a strike to protest the company's action. Thereafter, the company terminated the employees. The union then filed an unfair labor practice charge alleging a refusal to bargain. It asked the Board

sion of, the dispute to the Board of Arbitration, either party preserves the right to exercise its economic power in support of its demands, and any such action shall not be a violation of this contract, notwithstanding any other provisions of this contract.

to require the company to reinstate the employees. The National Labor Relations Board refused to require the company to reinstate them even though it found that the employer's action constituted an unfair labor practice. It took this action because the Union had struck rather than asked that the validity of the shift change be submitted to arbitration. The Third Circuit remanded the case to the Board instructing it to *consider* the company's failure to demand arbitration as a factor in determining whether the company had committed an unfair labor practice in terminating the employees. It reasoned:

Reducing this case to its bare essentials, we observe that labor and management agreed to grieve disputes and to submit disputes to the arbitral forum upon consent; that management never sought to force completion of the grievance procedure; that management did not communicate to the union before terminating the contract its consent to arbitrate; and that industrial strife ensued. The company could have compelled completion of the grievance procedure or communicated to the union its consent to arbitration, and thereby avoided these traumatic ruptures. We therefore hold that, in evaluating the company's post-strike actions, the Board should have considered as a factor the company's failure to seek peaceful resolution through the grievance procedure and in the arbitral forum.

United Steelworkers of Am., AFL-CIO-CLC v. N.L.R.B., *supra* at 278.

That Court further stated:

To summarize, the polestars of the national labor policy today are that industrial strife is to be avoided and that arbitration or alternative peaceful conflict resolutions are to be favored. The contract between the union and the company prohibited strikes unless and until a grievance and arbitration procedure had been exhausted. The union struck

prematurely. The company then joined the union in resort to the tooth and claw of industrial warfare when it might as easily have turned the other cheek and taken affirmative steps to get the dispute back in the available arbitral forum. The Board reasoned that the strike was an unprotected, material breach of the contract because the company's initial unfair labor practice was "non-serious"; it overlooked the company's failure to resort to available, peaceful alternatives. In light of recent trends in labor policy, we find error in this oversight.

Id. at 281.

We have no quarrel with the Third Circuit's decision. It may encourage arbitration and avoid industrial strife. The decision should not, however, be viewed as a precedent for permitting a union, that is a party to a contract with a broad arbitration clause, to ignore arbitration, to strike in order to secure a new contract and the continued employment of its members and then to recover lost wages for its striking members. Such a holding would discourage arbitration and encourage strikes. *Cf. Childrens Rehab. Ctr., Inc. v. Service Emp. Int. U. Loc.* 227, 507 F.2d 1077 (3d Cir.), *cert. denied*, 419 U.S. 1090 (1974). We decline the opportunity to make the practice a permissible one.

The decision of the District Court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT